

July 28, 2003

**HAND-DELIVERED
CONTAINS *IN CAMERA* SUBMISSIONS**

The Honorable George A. Finkle
Judicial Dispute Resolution
1411 Fourth Avenue, Suite 200
Seattle, WA 98101

Re: Docket No. G 02-45
In re Premera Blue Cross

Dear Judge Finkle:

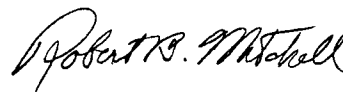
In accordance with the Commissioner's Tenth Order: Order to Produce Documents for *In Camera* Review, we are producing to you all of the documents identified on the privilege logs requested by the OIC Staff or its consultants. For ease of reference, those documents are listed in the attached table. If we have inadvertently omitted any document from that table, we trust that the OIC Staff will let us know promptly. In those cases in which Premera produced a document in redacted form, we are providing the as-produced (redacted) version, which is Bates labeled without a prefix, in addition to the original full-text document, which carries a PRE prefix matching the entries in the privilege log. We are also submitting to you *in camera* the Declaration of John P. Domeika, which provides context for the privilege log documents.

We enclose a copy of our briefing related to privilege issues. We have served copies of that briefing upon the Office of the Commissioner, the OIC Staff, and the Intervenors. For your convenience, we are also submitting copies of the out-of-state authorities cited in the brief.

Please let us know if you have any questions or would like additional submissions.

Very truly yours,

PRESTON GATES & ELLIS LLP

By 
Robert B. Mitchell

The Honorable George A. Finkle
July 28, 2003
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RBM:rbm
Enclosures

cc: Carol Sureau (w/table and briefing only)
John Hamje (w/table and briefing only)
Melanie de Leon (w/table and briefing only)
Michael Madden (w/table and briefing only)
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BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

No. G 02-45

In the Matter of the Application regarding
the Conversion and Acquisition of Control
of Premera Blue Cross and its Affiliates

PREMERA'S BRIEFING ON
PRIVILEGE ISSUES FOR THE
SPECIAL MASTER

PREMERA and Premera Blue Cross (collectively "Premera") offer the following legal analysis to assist the Special Master in reviewing Premera's privilege log documents pursuant to the Commissioner's Tenth Order. The privilege log documents are protected from disclosure under Washington law, as demonstrated below.

A. Attorney-Client Privilege Protects the Privilege Log Documents.

1. Washington Law Favors the Attorney-Client Privilege.

Washington law emphasizes the importance of the attorney-client privilege. See RCW 5.60.060(2)(a) ("An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."). The Washington Supreme Court has acknowledged the importance of the privilege, explaining that it exists "to afford the client freedom from fear of compulsory disclosure after consulting his legal advisor." State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 833, 394 P.2d 681 (1964). By

PREMERA'S BRIEFING ON PRIVILEGE ISSUES
FOR THE SPECIAL MASTER - 1

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1 protecting attorney-client communications, the privilege allows attorneys to render
2 effective legal assistance, while ensuring that a client may freely and openly communicate
3 with counsel. R.A. Hanson Co., Inc. v. Magnuson, 79 Wn. App. 497, 502, 903 P.2d 496
4 (1995).¹ The privilege extends to documents that contain a privileged communication.
5 Dietz v. Doe, 131 Wn.2d 835, 842, 935 P.2d 611 (1997).

6 The attorney-client privilege applies to 1) communications between attorney and
7 client; 2) made for the purpose of seeking or giving legal advice or in furtherance of the
8 representation of the client's legal interests; 3) that are intended and maintained as
9 confidential. See generally Karl B. Tegland, Washington Practice 5A: Evidence Law and
10 Practice §§501.10-501.15 (1999). In order to demonstrate the validity of a claim of
11 privilege, the claimant may rely on certain presumptions and inferences that operate in
12 favor of the privilege. For example, under federal common law (upon which Washington
13 courts routinely draw where there is no firm precedent on a subject) courts may presume
14 that an attorney-client communication is undertaken for a legal purpose. See, e.g., Boca
15 Investerings Partnership v. United States, 31 F. Supp. 2d 9, 12 (D.D.C. 1998) (discussing
16 presumption that in-house counsel in legal department is legal advisor).

17 **2. The Attorney-Client Privilege Extends to Those Third Parties Who**
18 **Are "Needed and Customary Participants in the Consultation," such**
19 **as Premera's Consultants.**

20 Premera's communications with its consultants, contained in documents on the
21 privilege log, also come within the scope of attorney-client privilege. Washington

22 ¹ Likewise, the United States Supreme Court has described the privilege in unequivocal terms:
23 "The attorney client privilege is one of the oldest recognized privileges for confidential
24 communications. The privilege is intended to encourage full and frank communication between
25 attorneys and their clients and thereby promote broader public interests in the observance of law
and the administration of justice." Swidler & Berlin v. U.S., 524 U.S. 399, 403 (1998) (quotation
and citation omitted). The Ninth Circuit has noted that the attorney-client privilege may be "the
most sacred of all legally recognized privileges, and its preservation is essential to the just and
orderly operation of our legal system." United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997).

1 recognizes that the attorney-client privilege extends to communications with those third
2 parties necessary for the representation of the client's legal interests. When a third party,
3 such as a consultant, "is present as a needed and customary participant in such
4 consultation, the circle of confidence may be reasonably extended to include him and the
5 privilege will be maintained." State v. Gibson, 3 Wn. App. 596, 599, 476 P.2d 727 (1970)
6 (discussing analogous privilege) (quoting C. McCormick, Law of Evidence § 104 (1954)).
7 The Washington Supreme Court has acknowledged that communications between litigants
8 and third parties with needed expertise may be protected as attorney-client privileged
9 communications. State v. Jones, 99 Wn.2d 735, 749, 664 P.2d 1216 (1982)
10 (communications between defendant and psychologist protected by attorney-client
11 privilege unless waived by raising insanity defense); State v. Aquino-Cervantes, 88 Wn.
12 App. 699, 707-09, 945 P.2d 767 (1997) (communications between interpreter, attorney,
13 and litigant protected; interpreter acts as "agent" of the attorney).

14 The class of privileged persons whose communications are protected includes the
15 various specialists that an attorney must consult in effectively representing his client. See
16 Lalanc & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 F. 563, 564 (S.D.N.Y. 1898)
17 (attorney client privilege extends to communications with consulting experts); 3
18 Weinstein's Federal Evidence § 503App.01[2] (Advisory Committee Note to Proposed
19 Standard 503, subdivision (a)(3)) (same). The Eighth Circuit has held that the attorney-
20 client privilege applies with equal force to communications between a consultant hired by
21 the client and the client's lawyers as it would apply to communications between the
22 client's employees and its lawyers. In re Bieter Co., 16 F.3d 929, 939-40 (8th Cir. 1994).
23 In Bieter, the court held that communications between a company's attorneys and an
24 independent contractor hired by the company to assist in the development of a parcel of
25

1 land were privileged. Id. Likewise, the court in McCaugherty v. Siffermann held that the
2 attorney-client privilege extended to consultants hired by the client. 132 F.R.D. 234, 239
3 (N.D. Cal. 1990).

4 The extent to which the attorney-client privilege includes communications with a
5 third party is determined by balancing two competing factors: (1) the need of the attorney
6 for the assistance of the non-lawyer in effectively representing the client, and (2) the
7 increased potential for inaccuracy in the truth-finding process as the trier of fact is
8 deprived of valuable witnesses. Murray v. Board of Educ., 199 F.R.D. 154, 156
9 (S.D.N.Y. 2001) (citing United States ex rel. Edney v. Smith, 425 F. Supp. 1038, 1046
10 (E.D.N.Y. 1976)). The complexities of this transaction support the need of Premera's
11 attorneys for the assistance of specialized consultants to effectively represent their client.
12 By contrast, there is a low risk of inaccuracy in the fact-finding process if communications
13 with Premera's consultants are protected. The states have engaged their own specialized
14 consultants to provide expertise and testimony in this proceeding,

15 Premera has three types of retained professionals whose communications are
16 reflected in the privilege log documents: tax, investment banking, and public relations
17 consultants. These consultants were retained by Premera's counsel in furtherance of
18 rendering legal advice to the company and come within the scope of attorney-client
19 privilege. In order to give the company appropriate advice about the legal consequences
20 of proceeding with its application, Premera's attorneys needed to understand the legal
21 implications of a completed conversion. This legal analysis required, for example, an
22 understanding of the potential tax and accounting ramifications of conversion, an analysis
23 for which Premera's attorneys needed the specific expertise of tax advisors and
24 accountants. These advisors come within the scope of privilege. See Aquino-Cervantes,
25

1 88 Wn. App. at 707-09 (privilege extends to “third parties indispensable to an attorney’s
2 provision of legal services to the client, such as ... accountants”) (citing cases).

3 Likewise, communications between Premera’s attorneys and its public relations
4 consultants are within the attorney-client privilege, as communications with professional
5 public relations agencies are privileged if undertaken in connection with the rendering of
6 legal advice. In re Copper Market Antitrust Litig., 200 F.R.D. 213, 217-18 (S.D.N.Y.
7 2001) (privilege protected an attorney’s communications with the client’s public relations
8 firm regarding the legal ramifications of the company’s public relations efforts). See also
9 Paul R. Rice, *Attorney-Client Privilege in the United States* (2d ed. 1999) § 7:13 p. 74
10 (discussing possibility that “efforts to assist in the preparation of a press release that
11 related to a sensitive legal issue and that might affect other matters upon which legal
12 assistance is being provided, could be seen as part of the larger legal representation that is
13 being provided”). Thus, as long as the consultant communications reflected in the
14 privilege log documents satisfy the other criteria for privileged communications, they
15 should be protected from discovery.

16 **3. The Privilege Log Documents Reflect Communications Made for the**
17 **Purpose of or Incident to Rendering Legal Advice to the Company.**

18 a. Premera’s Communications with Counsel Should be Presumed to
19 be Privileged Communications for the Purpose of Obtaining or
20 Rendering Legal Advice.

21 There is a well-established general presumption of legal purpose that attaches to
22 attorney-client communications. United States v. Chen, 99 F.3d 1495, 1501-02 (9th Cir.
23 1996) (engagement of attorney raises presumption that the lawyer has been retained to
24 provide legal advice); State v. American Tobacco Co. Inc., 1997 WL 728262 at *7 (Wash.
25 Sup. Ct., Nov. 21, 1997) (counsel’s advice on research proposal was privileged because
the “fact that an attorney was involved in the analysis suggests that his or her legal

1 expertise was required. Nothing in the memorandum defeats that inference"). See also
2 Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal. App. 4th 110, 123 (1997)
3 ("communications[s] in the course of the lawyer-client relationship" establish a "prima
4 facie claim of privilege") (applying California law). Consistent with the basic
5 presumption is the further "presumption that a lawyer in the [company's internal] legal
6 department or working for the general counsel is most often giving legal advice." Boca
7 Investerings, 31 F. Supp. 2d at 12 (attorney's tax advice on consequences of proposed
8 transaction were protected). In this instance, communications to or from Premera's in-
9 house legal team should be presumed to be for the purpose of rendering legal, rather than
10 business, advice.

11 Moreover, even if communications between Premera and its attorneys involve
12 some business issues, that does not vitiate the privilege. "[L]egal advice concerning
13 commercial transactions is often intimately intertwined with and difficult to distinguish
14 from business advice." Sedco Int'l, S.A. v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982).
15 As long as "the protected and non-protected purposes of the communications are
16 inextricably linked, thus precluding any separation of the communications into privileged
17 and non-privileged categories, the communications will be protected." Marsh v. Safir,
18 No. 99 CIV.8605JGKMHD, 2000 WL 460580 at *8 (S.D.N.Y., Apr. 20, 2000) (citing
19 cases). See also In re Grand Jury Subpoena Dues Tecum Dated Sept. 15, 1983, 731 F.2d
20 1032, 1038-39 (2d Cir. 1984) (documents concerning attorney advice as to "the tax
21 consequences of a reorganization and whether those consequences should affect the
22 structure of the corporate realignment, and as to corporate law considerations in
23 structuring the reorganization" are privileged as they "memorialize client confidences
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PREMERA'S BRIEFING ON PRIVILEGE ISSUES
FOR THE SPECIAL MASTER - 6

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1 obtained in the pursuit of legal advice concerning the mechanics and consequences of
2 alternative business strategies.”).

3 For example, in In re Ford Motor Co., 110 F.3d 954, 966 (3d Cir. 1997), the court
4 held that minutes of a meeting were privileged even though the meeting was held
5 primarily because of business considerations. In so concluding, the court noted that while
6 the primary purpose of the meeting was business related, certain business decisions could
7 not be reached without first addressing the potential legal implications inherent in those
8 decisions. Id. at 966-67 (“the ultimate decision reached by the Policy and Strategy
9 Committee could be characterized as a business decision, but the Committee reached that
10 decision only after examining the legal implications of doing so”). For many documents,
11 Premera’s legal analysis of aspects of the conversion cannot be separated from its business
12 decision to seek conversion. See also Coleman v. American Broadcasting Co., 106 F.R.D.
13 201, 206 (D.D.C. 1985) (advice of in-house counsel was privileged notwithstanding any
14 business ramifications involved) (“The mere fact that business considerations are weighed
15 in the rendering of legal advice does not vitiate the attorney-client privilege.”). Where
16 documents (such as corporate minutes and presentations) could be redacted to withhold
17 attorney-client communications and legal analysis but provide the business portions,
18 Premera has produced the documents in redacted form. Where a document is not
19 susceptible to redaction, it should be wholly protected.

20
21 b. Counsel’s Communications with Retained Consultants Are
22 Privileged Communications Incident to or in Furtherance of
Rendering Legal Advice.

23 The same analysis applies to those communications between Premera attorneys
24 and retained consultants that involve both business and legal issues. Washington
25 recognizes that “[t]echnical and administrative difficulties involved in the practice of law

1 and complex legal transactions often necessitate the assistance and special expertise of
2 non-lawyers in order to render adequate legal services.” Rice, *Attorney-Client Privilege*, §
3 3:3. In the course of furnishing legal advice, the attorney may incorporate relevant non-
4 legal considerations without losing the attorney-client privilege. *Id.* § 3:4. As with
5 attorney communications, consultant communications are not outside the scope of
6 privilege merely because they have business aspects, where the communication was in
7 furtherance of rendering legal advice. See *In re Bieter Co.*, 16 F.3d at 939-40.

8 In *McCaugherty v. Siffermann*, a savings and loan engaged consultants to provide
9 management advice and help market the company for sale. The court noted that the
10 consultants

11 did this work in an environment dense in regulations. We can safely
12 assume that they and their employers knew that whatever deals they
13 considered had to be analyzed within that regulatory framework. They
14 also knew that there would be consequential legal implications of the
terms on which the sale was consummated.

15 132 F.R.D. at 239. As a result, the court found that the attorneys’ reliance on their client’s
16 consultants was necessary to provide legal advice, and there was no “principled basis” to
17 distinguish those consultants from other company employees, as they were retained for the
18 express purpose of assisting with efforts to sell the company and were aware that the
19 complexity of the transactions would require consultation with the client’s attorneys. *Id.*

20 As in these cases, communications with Premera’s consultants were necessary for
21 Premera’s attorneys to advise Premera on how best to navigate a complex regulatory
22 framework and to ensure that Premera’s attorneys provided complete legal advice to the
23 company. Premera’s attorneys required the technical expertise of the retained consultants
24 in order to effectively advise their client about the legal issues inherent in the proposed
25 conversion. The consultants were also necessary for Premera’s attorneys to provide

PREMERA'S BRIEFING ON PRIVILEGE ISSUES
FOR THE SPECIAL MASTER - 8

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1 counsel on the existing and potential litigation arising out of the conversion proceedings.
2 Thus, communications between counsel, Premera, and these consultants come within the
3 privilege for attorney-client communications. Documents reflecting those
4 communications have been properly withheld from production.

5
6 **4. The Privilege Log Documents Reflect Communications That Were
Intended to Remain Confidential.**

7 All of the documents on the privilege logs were created with the intention that they
8 would remain confidential and have in fact been maintained as confidential by the
9 company and its legal staff. Premera does not anticipate that this aspect of the privilege
10 analysis is at issue. Cf. In re Grand Jury Subpoena, 731 F.2d at 1037 (holding certain
11 documents privileged where circumstances did not “create the factual inference that the
12 communications were not intended to be confidential at the time they were made.”).

13 As Premera has made a clear showing that documents withheld on privilege
14 grounds are in fact protected, these materials are not discoverable in this proceeding.
15 Privileges, such as that for attorney-client communications, apply equally in both judicial
16 and administrative proceedings:

17 The rationale for this view is obvious: if a communication or other kind of
18 information is to be privileged from disclosure for some policy reason
19 unrelated to the taking of evidence, it should be privileged everywhere,
20 not merely in court proceedings. Long established rules of privilege, such
21 as the attorney-client privilege, the marital privilege, or the trade secret
privilege, would be meaningless if protected in a lawsuit before a court,
but required to be disclosed in a proceeding before a zoning board of
adjustment or any other administrative agency.

22 W.L. Wearly v. F.T.C., 462 F. Supp. 589, 596 (D.N.J. 1978) (trade secret case), vacated
23 on ripeness grounds, W.L. Wearly v. F.T.C., 616 F.2d 662, 668 (3d Cir. 1980).² As the

24 _____
25 ² As the Supreme Court stated long ago in the context of an administrative proceeding:

1 Commissioner noted in his Tenth Order, the attorney-client privilege must be respected in
2 this proceeding just as it would be in a court of law. See also RCW 34.05.452(1)
3 (presiding officer "shall exclude evidence . . . on the basis of evidentiary privilege
4 recognized in the courts of this state."); Louisville, 236 U.S. at 336; Southern Cal. Gas Co.
5 v. Public Util. Comm'n, 50 Cal.3d 31, 38, 784 P.2d 1373 (1990). Accordingly, the
6 privilege that exists between Premera and its advisors must be respected.

7
8 **B. The Work Product Doctrine Protects Privilege Log Documents.**

9 **1. The Work Product Doctrine Protects Material Prepared in
Anticipation of Litigation from Disclosure in an Agency Proceeding.**

10 Most of Premera's withheld documents are protected from disclosure by the work
11 product doctrine in addition to the attorney-client privilege. The Civil Rules bar discovery
12 of "documents and tangible things . . . prepared in anticipation of litigation or for trial . . ."
13 unless the party seeking production can demonstrate "substantial need of the materials in
14 the preparation of his case and . . . [an inability] without undue hardship to obtain the
15 substantial equivalent of the materials by other means." CR 26(b)(4). The work product
16 doctrine applies here, as the same protections afforded litigants at trial should be granted
17 to the parties involved in contested administrative proceedings. Cf. Martin v. Monfort,
18 Inc., 150 F.R.D. 172, 173 (D. Colo. 1993) ("investigation by [a governmental] agency
19 presents more than a remote prospect of future litigation, and provides reasonable grounds
20 for anticipating litigation sufficient to trigger the application of the work product
21

22 The desirability of protecting confidential communications between attorney and client as
23 a matter of public policy is too well known and has been too often recognized by text-
24 books and courts to need extended comment now. If such communications were required
to be made the subject to examination and publication, such enactment would be a
practical prohibition upon professional advice and assistance.

25 United States v. Louisville & N.R. Co., 236 U.S. 318, 336 (1915).

PREMERA'S BRIEFING ON PRIVILEGE ISSUES
FOR THE SPECIAL MASTER - 10

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1 doctrine.”) (citing cases). See also RCW 48.31C.030(4) (parties “may conduct discovery
2 proceedings in the same manner as is allowed in the superior court of this state.”).

3 Premera’s withheld materials were prepared in anticipation of litigation in the form
4 of subsequent court proceedings, in addition to the pending administrative hearing.
5 Commissioner Kreidler himself recognized the likelihood of subsequent litigation over
6 Premera’s proposed conversion. At a public meeting concerning Premera’s application,
7 the Commissioner stated:

8 I take this filing very seriously. It has been a significant issue, as Mr.
9 Odiome pointed out, in other states when this has taken place. It has
10 significant ramifications for the public. Decisions that are made here are
11 not infrequently going to be challenged in the courts, either – no matter
12 what decision we make ...

13 Comments of Commissioner Kreidler, Transcript of Vancouver Public Meeting regarding
14 In re Premera, October 15, 2002 (p. 40) (available on the OIC website at
15 http://www.insurance.wa.gov/special/premera/Premera_PublicMeeting10-15-02.pdf).

16 As courts acknowledge, a party can anticipate litigation before a lawsuit is filed.
17 Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 42 (D.Md. 1974). Indeed, “[t]he work
18 product doctrine applies to material prepared when litigation is merely a contingency.”
19 Id.; see also Harris v. Pierce County, 84 Wn. App. 222, 234, 929 P.2d 1111 (1996)
20 (affording work product protection to documents prepared when it was expected that
21 administrative matter would proceed to litigation). Premera is already a party to two
22 Superior Court proceedings involving issues related to the proposed conversion. Because
23 documents concerning legal aspects of Premera’s proposed reorganization have been
24 prepared in anticipation of litigation at both the agency and Superior Court level, they are
25 doubly protected.

1 The work product doctrine applies so long as “the material was prepared in
2 anticipation of *some* litigation, not necessarily in anticipation of the *particular* litigation in
3 which it is being sought.” Ford Motor Co., 110 F.3d at 967 (emphasis in original). In
4 fact, work product protection applies to documents prepared for other litigation, even
5 when the party that prepared the document is not a party to the litigation in question.
6 Harris v. Drake, 116 Wn. App. 261, 281, 65 P.3d 350 (2003) (where doctor retained by
7 insurer conducted medical examination in connection with insurance dispute, this material
8 was protected work product in litigation on related tort claim to which insurer was not a
9 party). Therefore, even if Premera’s documents were prepared for litigation unrelated to
10 this proceeding, the work product doctrine still protects them.

11 Documents reflecting investigation by Premera or its counsel concerning claims or
12 strategy in the conversion hearing and/or collateral or subsequent litigation are work
13 product and thus properly withheld from discovery.

14 **2. Documents Prepared by Premera’s Consultants in Anticipation of**
15 **Litigation Are Protected by the Work Product Doctrine.**

16 Documents prepared by Premera’s consultants also carry work product protection.
17 The work product doctrine protects work product prepared not only “by or for” a party,
18 but also work product prepared by or for that party’s “representative,” a category which
19 includes not only attorneys, but also “consultant[s], . . . or agent[s].” CR 26(b)(4).

20 Documents created in anticipation of litigation by a party, the party’s attorney, *or agents*
21 *working for the party or counsel* are protected work product. Linstrom v. Ladenburg,
22 110 Wn. App. 133, 143 n.11, 39 P.3d 351 (2002) (“the ability to protect work product
23 normally extends to both clients and attorneys”) (citations and quotations omitted). Put
24 simply, “there is no distinction between attorney and non-attorney work product.”
25 Heidebrink v. Moriwaki, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). Consultant research

1 is also protected: "studies or tests conducted after a party is aware of potential litigation"
2 are work product. Martin, 150 F.R.D. at 173. In this case, consultant documents that
3 reflect work done in anticipation of the administrative hearing, as well as subsequent or
4 collateral litigation, were properly withheld from disclosure.

5 The Civil Rules plainly protect the work product of non-testifying experts such as
6 Premera's retained consultants. Premera has advised the OIC Staff that it does not
7 anticipate at this time calling as a witness any of the consultants identified on the privilege
8 logs. See Letter from J. Domeika to P. Cantilo dated April 17, 2003. CR 26(b)(4) is
9 expressly "subject to the provisions of subsection (b)(5)," which governs discovery from a
10 party's non-testifying expert witnesses. CR 26(b)(4). CR 26(b)(5) provides that "facts
11 known or opinions held" by non-testifying experts, if "acquired or developed in
12 anticipation of litigation or for trial," can only be discovered "upon a showing of
13 exceptional circumstances under which it is impracticable for the party seeking discovery
14 to obtain facts or opinions on the same subject by other means." CR 26(b)(5). In
15 addition, "although CR 26(b)(4) and CR 26(b)(5) are closely related, CR 26(b)(5) controls
16 in the case of a conflict." Harris, 116 Wn. App. at 270.

17 As a result, documents created by Premera's consultants as part of preparing for
18 the hearing or related litigation are entitled to protection from disclosure and may be
19 disclosed only if there is a showing of exceptional circumstances.

20
21 **3. Documents That Encompass Both Business and Legal Topics Are
22 Protected by the Work Product Doctrine.**

23 As with the attorney-client privilege, documents are protected by the work product
24 doctrine even when they are prepared for dual purposes of business and litigation. In
25 determining whether particular materials were prepared in anticipation of litigation or in

1 the regular course of business, the trial court looks to the specific parties involved and the
2 expectations of those parties. Heidebrink, 104 Wn.2d at 400.³ As a practical matter,
3 Premera's proposed reorganization is undisputedly an exceptional event in the life of the
4 company. Materials that relate to the application for approval of Premera's reorganization
5 were not produced in the ordinary course of business.

6
7 **4. There Is No Need to Produce Work Product, Because the Mental**
8 **Impressions of Premera and its Counsel Are Both Absolutely**
9 **Protected and Irrelevant to These Proceedings.**

10 In order to require the production of work product, there must be a showing that
11 there is a "substantial need" for the information that cannot be duplicated by other means.
12 Hendrick v. Avis Rent A Car Sys., Inc., 916 F. Supp. 256, 260-61 (W.D.N.Y. 1996). To
13 demonstrate a "substantial need," the sought-after materials must be "essential" to the
14 case, as the mere desire to obtain additional evidence is insufficient to justify disclosure of
15 work product. Fletcher v. Union Pac. R.R. Co., 194 F.R.D. 666, 671 (S.D. Cal. 2000).
16 Neither the OIC Staff nor any other party can show such a need. Most of the privilege log
17 documents are legal and technical analysis of data that has been disclosed. No party has a
18 substantial need for Premera's analysis of disclosed data, as other parties (or their experts)
19 can duplicate the information by conducting their own analysis.

20 Even if a party could demonstrate that Premera's work product was "essential" to
21 its case, "[t]he mental impressions of the attorney and other representatives of a party are
22 absolutely protected, unless their mental impressions are directly at issue." Limstrom v.

23 ³ A party can satisfy its burden of establishing that materials were prepared in anticipation of
24 litigation by submitting an affidavit from counsel testifying as to the purpose for the documents'
25 creation. In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987, 130 F.R.D. 641,
644-45 (E.D. Mich. 1989).

1 Ladenburg, 136 Wn.2d 595, 611, 963 P.2d 869 (1998) (citation and quotation omitted);
2 see also CR 26(b)(4) ("In ordering discovery of [work product] when the required
3 showing has been made, the court shall protect against disclosure of the mental
4 impressions, conclusions, opinions, or legal theories of an attorney or other representative
5 of a party concerning the litigation.").

6 Unless the mental impressions of an attorney or other party representative are
7 central to the claims at issue (as, for example, in a malpractice proceeding), they are
8 absolutely protected from discovery. Limstrom v. Ladenburg, 136 Wn.2d at 611. The
9 mental impressions of Premera's attorneys are not central to any claims in this proceeding.
10 The contents of Premera's required filing are statutorily mandated. See, e.g., RCW
11 48.31C.030(2). These statutory requirements do not contain any reference to Premera's
12 decision-making process. Likewise, the statutory criteria for the Commissioner's review
13 of this transaction do not include an evaluation of Premera's subjective thought process.
14 See, e.g., RCW 48.31C.030(5)(a). Because the mental impressions and case preparation
15 of Premera, its counsel, and its consultants are not directly at issue in this proceeding,
16 those mental impressions are protected, as are the documents that reflect them.

17 **C. That Documents May Reference Facts Pertinent to This Proceeding Does Not**
18 **Open up Otherwise Privileged Materials to Discovery.**

19 Attorney-client communications are protected from discovery whether or not they
20 include "facts." The Washington Supreme Court expressly distinguished between the
21 discovery of attorney-client communications concerning facts, and discovery of the
22 underlying facts (which may be learned by questioning the client directly). Wright v.
23 Group Health Hosp., 103 Wn.2d 192, 691 P.2d 564 (1984). Quoting the United States
24
25

1 Supreme Court, the Washington Supreme Court explained:

2 A fact is one thing and a communication concerning that fact is an entirely
3 different thing. The client cannot be compelled to answer the question,
4 "What did you say or write to the attorney?" but may not refuse to disclose
any relevant fact within his knowledge merely because he incorporated a
statement of such fact into his communication to his attorney.

5 Id. at 195 (quoting Upjohn Co. v. United States, 449 U.S. 383, 395-96, 101 S.Ct. 677
6 (1981)).

7 The Washington Supreme Court has also held that materials containing facts are
8 entitled to work product protection. Limstrong, 136 Wn.2d at 611. As with the attorney-
9 client privilege, work product protection extends to otherwise protected documents
10 containing facts, even if a claim of work product protection would not block discovery of
11 the facts themselves:

12 [I]t is . . . inconsequential that the information contained in the subject
13 documents . . . is primarily factual. . . . [This] does not mean, however, that
14 otherwise protected documents lose their work product status merely
15 because they contain factual information. If a document constitutes
protected work product, the party possessing the document generally need
not produce it – even if the document contains only factual information.

16 Atl. Richfield Co. v. Current Controls, Inc., No. 93-CV-0950E(H), 1997 WL 538876, *3
17 (W.D.N.Y. Aug. 21, 1997) (internal citations omitted).⁴ Simply because a document
18 contains facts does not mean it is not protected. On the contrary, work product as well as
19 attorney-client privilege protect a document even where it is substantially factual.

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24 ⁴ As the Atlantic Richfield court noted, materials protected as work product can be discovered in
25 limited circumstances (by showing substantial need and an inability to otherwise obtain the
materials). 1997 WL 538876, *3 n.4. That exception has no application here.

1
2
3 **D. Conclusion**

4 In providing this legal memorandum, Premera has tried to anticipate the questions
5 that may arise during the Special Master's *in camera* review. If the Special Master would
6 like further briefing, Premera would be happy to provide legal analysis of any issue.

7 DATED this 28th day of July, 2003.

8 PRESTON GATES & ELLIS LLP

9
10 By Robert B. Mitchell
11 Thomas E. Kelly, Jr., WSBA # 05690
12 Robert B. Mitchell, WSBA # 10874
13 Attorneys for PREMERA and
14 Premera Blue Cross
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Privilege Log Documents Requested by Consultants

<u>Document No.</u>	<u>Requested by</u>
PPRE 0000000001 – 0000000012	PWC, Blackstone, Cantilo
PPRE 0000000013 – 0000000020	PWC, Blackstone, Cantilo, Navigant
PPRE 0000000021 – 0000000038	Cantilo, Signal Hill
PPRE 0000000039 – 0000000061	Cantilo, Signal Hill
PPRE 0000000074 – 0000000074	Navigant, Signal Hill
PPRE 0000000075 – 0000000075	Signal Hill
PPRE 0000000076 – 0000000105	Cantilo, Signal Hill
PPRE 0000000107 – 0000000107	Signal Hill
PPRE 0000000108 – 0000000108	Signal Hill
PPRE 0000000122 – 0000000123	Signal Hill
PPRE 0000000124 – 0000000124	Signal Hill
PPRE 0000000127 – 0000000130	Signal Hill
PPRE 0000000131 – 0000000133	PWC, Navigant, Signal Hill
PPRE 0000000134 – 0000000136	PWC, Blackstone, Cantilo, Navigant, Signal Hill
PPRE 0000000137 – 0000000139	PWC, Blackstone, Navigant, Signal Hill
PPRE 0000000140 – 0000000170	Reden, Signal Hill
PPRE 0000000171 – 0000000275	Blackstone, Navigant, Signal Hill
PPRE 0000000276 – 0000000302	Blackstone, Navigant, Signal Hill
PPRE 0000000303 – 0000000407	Blackstone, Signal Hill
PPRE 0000000408 – 0000000435	Blackstone, Signal Hill
PPRE 0000000436 – 0000000475	Blackstone, Navigant, Signal Hill
PPRE 0000000476 – 0000000537	Blackstone, Navigant, Signal Hill
PPRE 0000000538 – 0000000569	Blackstone, Navigant, Signal Hill
PPRE 0000000570 – 0000000579	Blackstone, Navigant, Signal Hill
PPRE 0000000580 – 0000000628	Blackstone, Navigant, Signal Hill
PPRE 0000000629 – 0000000641	PWC, Blackstone, Navigant, Reden, Signal Hill
PPRE 0000000642 – 0000000680	Blackstone, Navigant, Reden, Signal Hill
PPRE 0000000681 – 0000000684	PWC, Blackstone, Navigant, Signal Hill
PPRE 0000000696 – 0000000724	Blackstone, Navigant, Signal Hill

PPRE 0000000725 – 0000000725	Navigant, Signal Hill
PPRE 0000000726 – 0000000728	Navigant, Signal Hill
PPRE 0000000729 – 0000000732	Navigant, Signal Hill
PPRE 0000000733 – 0000000743	Navigant, Signal Hill
PPRE 0000000744 – 0000000744	Navigant, Reden, Signal Hill
PPRE 0000000745 – 0000000751	Blackstone, Navigant, Signal Hill
PPRE 0000000752 – 0000000769	Navigant, Signal Hill
PPRE 0000000770 – 0000000784	Navigant, Signal Hill
PPRE 0000000785 – 0000000787	Signal Hill
PPRE 0000000788 – 0000000796	Blackstone, Navigant, Signal Hill
PPRE 0000000797 – 0000000801	Navigant, Signal Hill
PPRE 0000000802 – 0000000807	Signal Hill
PPRE 0000000808 – 0000000818	Blackstone, Signal Hill
PPRE 0000000819 – 0000000829	Blackstone, Signal Hill
PPRE 0000000830 – 0000000830	Signal Hill
PPRE 0000000831 – 0000000835	Navigant, Signal Hill
PPRE 0000000836 – 0000000844	Signal Hill
PPRE 0000000845 – 0000000847	Navigant, Signal Hill
PPRE 0000000848 – 0000000858	Signal Hill
PPRE 0000000859 – 0000000869	Signal Hill
PPRE 0000000870 – 0000000878	Signal Hill
PPRE 0000000879 – 0000000882	Blackstone, Signal Hill
PPRE 0000000883 – 0000000886	PWC, Blackstone, Navigant, Reden, Signal Hill
PPRE 0000000887 – 0000000903	Blackstone, Signal Hill
PPRE 0000000904 – 0000000912	PWC
PPRE 0000000913 – 0000000915	Blackstone, Signal Hill
PPRE 0000000916 – 0000000918	Blackstone, Signal Hill
PPRE 0000000919 – 0000000932	PWC, Navigant, Signal Hill
PPRE 0000000933 – 0000000946	PWC, Navigant, Signal Hill
PPRE 0000000947 – 0000000949	Navigant
PPRE 0000000950 – 0000000952	Navigant

PPRE 0000000953 – 0000000955	PWC, Navigant
PPRE 0000000956 – 0000000958	PWC, Navigant
PPRE 0000000959 – 0000000968	Navigant, Signal Hill
PPRE 0000000969 – 0000000978	Signal Hill
PPRE 0000000979 – 0000000996	PWC, Navigant
PPRE 0000000997 – 0000001012	Navigant
PPRE 0000001013 – 0000001018	Signal Hill
PPRE 0000001019 – 0000001024	Signal Hill
PPRE 0000001025 – 0000001037	Navigant
PPRE 0000001038 – 0000001045	Navigant
PPRE 0000001046 – 0000001060	Navigant
PPRE 0000001061 – 0000001065	Navigant
PPRE 0000001066 – 0000001083	Navigant
PPRE 0000001084 – 0000001089	Navigant
PPRE 0000001090 – 0000001107	Navigant
PPRE 0000001108 – 0000001127	Cantilo, Navigant
PPRE 0000001128 – 0000001227	Blackstone, Navigant, Signal Hill
PPRE 0000001228 – 0000001369	Blackstone, Navigant, Signal Hill
PPRE 0000001370 – 0000001371	Blackstone, Navigant, Signal Hill
PPRE 0000001372 – 0000001372	Blackstone, Signal Hill
PPRE 0000001373 – 0000001380	Blackstone, Reden, Signal Hill
PPRE 0000001381 – 0000001389	PWC, Blackstone, Signal Hill
PPRE 0000001390 – 0000001392	PWC, Blackstone, Signal Hill
PPRE 0000001393 – 0000001395	PWC, Blackstone, Navigant, Signal Hill
PPRE 0000001396 – 0000001398	PWC
PPRE 0000001399 – 0000001466	PWC, Reden, Signal Hill
PPRE 0000001467 – 0000001472	Cantilo, Navigant
PPRE 0000001473 – 0000001479	Navigant
PPRE 0000001480 – 0000001499	Cantilo
PPRE 0000001500 – 0000001501	Signal Hill
PPRE 0000001502 – 0000001507	PWC, Navigant

PPRE 0000001508 – 0000001526	Reden, Signal Hill
PPRE 0000001527 – 0000001529	PWC
PPRE 0000001530 – 0000001535	Navigant, Signal Hill
PPRE 0000001536 – 0000001543	Navigant
PPRE 0000001544 – 0000001553	Navigant
PPRE 0000001554 – 0000001563	Navigant
PPRE 0000001564 – 0000001567	PWC, Navigant
PPRE 0000001568 – 0000001571	PWC, Navigant
PPRE 0000001572 – 0000001573	PWC, Blackstone, Navigant, Reden, Signal Hill
PPRE 0000001574 – 0000001582	Navigant, Reden
PPRE 0000001583 – 0000001630	PWC, Blackstone, Navigant, Reden, Signal Hill
PPRE 0000001631 – 0000001632	PWC, Blackstone, Navigant, Signal Hill
PPRE 0000001633 – 0000001727	PWC, Blackstone, Navigant, Reden, Signal Hill
PPRE 0000001728 – 0000001738	Navigant
PPRE 0000001820 – 0000001829	Cantilo
PPRE 0000001830 – 0000001838	Cantilo

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application
Regarding the Conversion and
Acquisition of Control of Premera Blue
Cross and its Affiliates

No. G02-45

CERTIFICATE OF SERVICE

I, Dennis M Tessier, certify that I served a copy of the following document(s):

1. LETTER FROM ROBERT MITCHELL TO JUDGE FINKLE WITH ATTACHED DOCUMENT SPREADSHEET
2. PREMERA'S BRIEFING ON PRIVILEGE ISSUES FOR THE SPECIAL MASTER
3. CERTIFICATE OF SERVICE

on all parties or their lead counsel of record on the date below as follows:

Service To:	Service Perfected By:
Carol Sureau Deputy Insurance Commissioner Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 P.O. Box 40255 Olympia, WA 98504-0255 (Original & 4 plus 1 Electronic by E-Mail)	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-Mail
John F. Hamje	<input checked="" type="checkbox"/> By United States Mail

CERTIFICATE OF SERVICE - 1

Service To:	Service Perfected By:
Legal Affairs Division Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 P.O. Box 40255 Olympia, WA 98504-0255	<input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail
James T. Odiorne Deputy Insurance Commissioner Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail
Amy McCullough Alaska Legal Services Corporation 1016 West 6 th Avenue, Ste. 200 Anchorage, AK 99501	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail
Eleanor Hamburger John Midgley Columbia Legal Services 101 Yesler Way, Suite 300 Seattle, WA 98104	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail
Michael Madden Michael S. Shachat Bennett Bigelow & Leedom, P.S. 999 Third Avenue, Suite 2150 Seattle, WA 98104	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail
Jeff Coopersmith Coopersmith & Associates, Inc. 701 Fifth Avenue, Suite 4200 Seattle, WA 98104	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail

CERTIFICATE OF SERVICE - 2

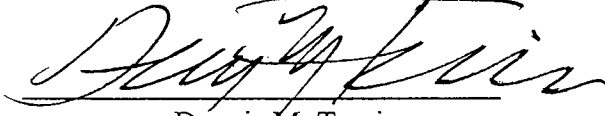
PRESTON GATES & ELLIS LLP
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SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE (206) 623-7580
FACSIMILE (206) 623-7022

1 In addition to the above listed materials, the following will be served on Judge
2 Finkle only:

- 3 1. CONFIDENTIAL DECLARATION OF JOHN DOMEIKA
- 4 2. CITED OUT OF STATE AUTHORITY
- 5 3. PREMERA'S PRIVILEGE LOG DOCUMENTS

6 I certify under penalty of perjury under the laws of the State of Washington that
7 the foregoing is true and correct.

8 DATED this Monday, July 28, 2003.

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10
11 Dennis M. Tessier

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CERTIFICATE OF SERVICE - 3

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